Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-871

JOHN V. TERRY and ALINE S. TERRY,
Petitioners,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, and LEONARD M. FREIDMAN, ROBERT K. PUGLIA, and EDWIN J. REGAN, Justices of the Court of Appeal of the State of California, Third Appellate District,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons for granting the writ	6
A. Bad cases through dicta have evolved judicial immunity into judicial sovereignty	6
B. 42 U.S.C.A. 1983 provides a Federal remedy where State courts do not. Review of facts and law are not involved as much as due process	7
C. The present case would be a proper vehicle to reconcile 42 U.S.C.A. 1983 with judicial immunity and with Stump v. Sparkman, No. 76-1750, pending herein	8
Conclusion	
A decision in the present case would strengthen our court system under law and head off illegal judicial sovereignty	8-9

Table of Authorities Cited

Cases	Pages
Stump v. Sparkman, No. 76-1750, ruling below, CA 7, 45 LW 2462	8

Rules	
Fed. R., Civ. P., Rule 56	2

Statutes	
12 U.S.C.A., Sec. 1131d, as amended, Sec. 20 of the Farm Credit Act of 1933	4, 5
12 U.S.C.A., Sec. 2091	5
28 U.S.C.A., Sec. 1254(1)	2
42 U.S.C.A., Sec. 1983	2, 3, 5, 7, 8

Constitutions	
California Constitution, Art. XI, Sec. 4½, as amended in 1914	3

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding November 1, 1977, petition for rehearing denied November 18, 1977, affirming summary judgments against Petitioners, which had

been entered by the United States District Court for the Eastern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. The order denying petition for rehearing is attached as Appendix B. The District Court wrote no opinion. Its Orders granting defendants' motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P., are attached to this Petition as Appendices C and D.

JURISDICTION

The Court of Appeals entered judgment November 1, 1977, herein. Petitioners' Petition for Rehearing was denied by the Court of Appeals on November 18, 1977, in an unpublished Order. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

Does the doctrine of judicial immunity supercede 42 U.S.C.A. Sec. 1983? Conceding immunity from personal liability, does judicial immunity permit the taking of a farmer's ranch, stock and equipment without due process?

STATUTES INVOLVED

42 U.S.C.A. Sec. 1983 provides as follows:

> That every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (Sec. 1983 is derived from the Act of April 20, 1871.)

California Constitution, Art. XI, Sec. 4½, as amended in 1914, provides:

> No judgment shall be set aside, or new trial granted, in any case, on the grounds of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error to any matter of procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

STATEMENT OF THE CASE

This case was initiated by Klamath Production Credit Association upon notes claimed due and owing from the Terrys and to foreclose security interests against their ranch, livestock, and farm equipment.

The Terrys cross-complained for fraud, deceit, and undue influence and breach of confidential relationship by the Klamath Production Credit Association, causing them damages. After a jury trial in the Superior Court of Siskiyou County, California, the Terrys prevailed and recovered judgment against Klamath Production Credit Association for their damages and a cancellation of the note and security instruments. Klamath Production Credit Association appealed to the California Court of Appeal for the Third Appellate District, challenging the sufficiency of the evidence, the cancellation of their obligations, and the award of punitive damages. Respondents Freidman, Puglia, and Regan, without any transcript in relation to the submission of instructions and verdict form, which had been agreed upon between counsel for Klamath Production Credit Association and the Terrys, without argument, assignment of error, or other basis, found that the instructions and the verdict form were confusing. This gave Respondents herein the authority to substitute their own findings of fact and judgment for those of the trial judge and jury. This was contrary to California law and due process.

Klamath Production Credit Association is chartered under Sec. 20 of the Farm Credit Act of 1933, 12 U.S.C.A., Sec. 1131d, as amended. In 1971, Congress rewrote the law and enacted a comprehensive credit system which provides: "Each production credit association chartered under Section 20 of the Farm Credit

Act of 1933, as amended, shall continue as a *federally chartered instrumentality* of the United States.", 12 U.S.C.A., Sec. 2091.

The instructions and jury verdict form were not challenged by the Klamath Production Credit Association in the Court of Appeal for the Third Appellate District of California, either by transcript, in their brief, or oral arguments. This matter was not brought up on oral argument before that court, and the Terrys were given no hearing, either in that court or the California Supreme Court, in relation thereto. Thus, the matter was never heard in the California State Courts.

The Terrys then filed a petition for removal of the State Court action to the United States District Court for the Eastern District of California, citing as a basis for such removal, 42 U.S.C.A. 1983. At the same time, a legal action was commenced in the United States District Court for the Eastern District of California, based upon the depriving of the Terrys of their judgment and property without due process, made actionable under 42 U.S.C.A. 1983. The Respondents Freidman, Puglia, and Regan requested summary judgment on the basis of judicial immunity. Klamath Production Credit Association requested summary judgment on the basis that it had not acted under the color of any statute or other law of any state or territory.

The United States District Court for the Eastern District of California held that judicial immunity

barred the action against Freidman, Puglia, and Regan, even though no personal judgment was sought against these Respondents. This also barred the action against Klamath Production Credit Association because it was not acting under color of any statute or law. This provided an ingenuous loophole for the denial of redress to the Terrys by the confusion of general legal principles.

REASONS FOR GRANTING THE WRIT

A. THUS THE DOCTRINE OF JUDICIAL IMMUNITY HAS BECOME THE DOCTRINE OF JUDICIAL SOVEREIGNTY.

Cases where there were no causes of action were dismissed on the basis of judicial immunity. This combined with the natural reluctance of one judge to pass judgment on another and strengthened the original error. Generally speaking, a judicial officer should be immune from actions for damages caused by error in his acting upon the matters before him. This can be corrected on appeal. But where a judicial officer has acted outside of his jurisdiction and falsified the record to do so, and this deprives a citizen of his property and property rights, judicial immunity should not bar the remedy even though the officers be immune from personal liability. Thus in an action brought for judicial wrong, the judge defends his reputation, the wrongfully benefited party loses his illicit gain, and the ends of justice are served. That the wrongful taking was under color of State law by the judges and Federal agency cannot be disputed.

Does the undeserved-unblemished reputation of a judicial officer outweigh the wrongful taking of a farm couple's property and livelihood under a misconceived theory of judicial self-preservation? This is judicial sovereignty without legal basis or right.

B. 42 U.S.C.A. 1983 DOES NOT PROVIDE FOR A REVIEW OF STATE COURT DECISIONS BY THE FEDERAL COURT, BUT THIS IS THE AVENUE OF ESCAPE CHOSEN BY THE FEDERAL COURTS IN THEIR CONFUSION OF THE DOCTRINE OF JUDICIAL IMMUNITY.

If the facts and law of a given case are properly before the State Court, and the State Court makes a decision for whatever reason, this is not subject to challenge under 42 U.S.C.A. 1983, race, religion, or politics notwithstanding. But where a matter is not before the State Court and there is a State constitutional provision prohibiting such action, an act of the State Court depriving a party of its rights, privileges, and immunities does render that judge subject to action under 42 U.S.C.A. 1983, but not personal liability under the doctrine of judicial immunity. Thus the remedy provided by statute is permitted and the doctrine of separation of powers is preserved and justice is satisfied under our law.

C. THIS PETITION PRESENTS THIS COURT WITH AN OPPORTUNITY TO RECONCILE THE DOCTRINE OF JUDICIAL IMMUNITY WITH 42 U.S.C.A. 1983, SO AS TO PREVENT A WRONGFUL JUDICIAL ACT FROM DEPRIVING THE HARD WORKING FARM COUPLE FROM THE FRUITS OF THEIR LIFE'S WORK.

Prior cases directed to this Court's attention have attempted to correct error in the State Court and to impose personal liability upon judicial officers where no such cause of action existed. This case does not charge the Respondents Freidman, Puglia, and Regan with error, but with judicial wrongdoing. It does not seek to recover damages from these Respondents, but the relief to which Petitioners are entitled from the Respondent Klamath Production Credit Association, which in fact caused these damages.

The Court recently granted certiorari in the case of *Stump v. Sparkman,* No. 76-1750, ruling below CA 7, 45 LW 2462, which shows the pressing need for some type of proper solution to the problems presented herein. That case is in conflict with the decision herein sought to be reviewed.

CONCLUSION

Judicial immunity should be defined so as to protect judicial officers from personal liability for acts within the scope of their duties, but not to prevent the redress of wrongs committed by such excessive acts as authorized by 42 U.S.C.A. 1983. Petitioners respectfully request a Writ of Certiorari be granted to define the doctrine, which the lower courts were

unwilling to do, and strengthen, rather than weaken, the judiciary. Sovereignty is not permitted by our Constitution or our way of life, and the refusing to hear an action involving a judicial officer is the imposition of sovereignty rather than the more flexible doctrine of immunity, which does prevent redress for a wrongful act.

December 14, 1977.

Respectfully submitted,
GLENN D. RAMIREZ,
Attorney for Petitioners.

(Appendices Follow)

Appendices

Appendix A

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 77-1019

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs-Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, and LEONARD M. FRIEDMAN, ROBERT K. PUGLIA, and EDWIN J. REGAN, Justices of the Court of Appeal of the State of California, Third Appellate Judicial District,
Defendants-Appellees.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Plaintiff and Cross-Defendant-Appellees,

vs.

JOHN V. TERRY, et ux., et al.,
Defendants and Cross-Complainant-Appellants.

[November 1, 1977]

Appeal from the United States District Court
for the Eastern District of California

MEMORANDUM

Before: TRASK, WALLACE and ANDERSON, Circuit Judges.

This appeal involves two actions which were consolidated by the District Court below. The action styled "Klamath Production Credit Assoc. (KPCA) v. John V. Terry, et ux." (the Terrys) was originally commenced in the Superior Court of the State of California by KPCA to collect money due on some notes and to foreclose upon the security for the notes. The Terrys cross-complained on the grounds of fraud, deceit and duress. On this cross-complaint they were awarded a $65,000.00 judgment. KPCA appealed to the California Court of Appeals for the Third Appellate District. There, three Appellate Justices, The Honorable Leonard M. Friedman, Robert K. Puglia and Edwin J. Regan, reversed the $65,000.00 judgment and remanded the case back to the trial court.[1] The Terrys then filed a petition for removal in the United States District Court for the Eastern District of California. KPCA moved to remand the case back to the state courts on the ground that the District Court lacked jurisdiction over the action and on the ground that the petition for removal was not timely. The court granted the motion to remand and the Terrys appealed. We dismiss this appeal.

The action styled "John V. Terry, et ux v. Klamath Production Credit Association, et al." is a § 1983 civil

[1]Terry's petition for rehearing with the Court of Appeals was denied. Terrys then filed a petition for hearing in the Supreme Court of the State of California which was likewise denied.

rights action (42 U.S.C. 1983) against KPCA and the three Appellate Court Judges who reversed the Terrys' state court judgment. Basically, the complaint alleged that KPCA prosecuted an appeal "totally lacking in merit," that the defendant judges erroneously reversed the trial court's decision, and that the defendant judges "unlawfully" deprived the Terrys of their property without due process of law. The complaint sought injunctive relief and damages.

KPCA and the defendant judges moved to dismiss the complaint. The District Court granted the motion on the ground that the complaint failed to state a claim upon which relief could be granted. The Terrys appealed. We affirm.

REMAND ISSUE

The Terrys have appealed from the District Court's order which remanded their state case back to the California state courts. We dismiss this appeal because we have no jurisdiction.

It is well-settled that an order remanding a case to the state court from which it was removed is not reviewable on appeal, 28 U.S.C. 1447(d).[2] ". . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c) (the same grounds specified by the District

[2]There is one exception to this rule and that is for cases which were originally removed under 28 U.S.C. 1443. This exception is inapplicable in this case because removal under 28 U.S.C. 1443 must be premised on a denial of civil rights "stated in terms of *racial* equality." *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (emphasis added).

Court in the instant case (CT 188)) whether or not that order might be deemed erroneous by an appellate court." *Therntron Products, Inc. v. Hermansdorfer*, 523 U.S. 336, 351 (1976).

THE § 1983 ACTIONS

As for the civil rights claim against KPCA, a private party cannot be held liable under 42 U.S.C. 1983 unless his wrongful action was done under color of state law or state authority. *Monroe v. Pape*, 365 U.S. 167 (1961), *Hill v. McClellan*, 490 F. 2d 859 (5th Cir. 1974). Nowhere have the Terrys alleged that KPCA acted under color of state law. Even assuming they had so alleged, their claim against KPCA would have to fail because merely utilizing the legal machinery of the state court system is not action "under color of state law." *See, Stevens v. Frick*, 372 F. 2d 378, 381 (2nd Cir. 1967), *cert. den.*, 387 U. S. 920.

The Terrys' civil rights claim against the three California Court of Appeal Judges must fail because the judges are immune from civil liability for acts committed within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 554 (1967), *Gregory v. Thompson*, 500 F. 2d 59, 63 (9th Cir. 1974). There is no question that the three judges, in reversing the Terrys' lower court judgment were acting within their judicial jurisdiction.

INJUNCTIVE RELIEF

The California Court of Appeal had reversed the lower court judgment in favor of the Terrys. The

Terrys now urge that the federal courts, in effect, review and reverse that decision by restraining the California appellate court from enforcing or effecting its decision.

There are no circumstances in this case which would even remotely justify federal intervention into the state court proceedings. We find that the district court below properly refrained from interjecting itself into the affairs of the state courts. *See, Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975).

This appeal is DISMISSED in part and AFFIRMED in part.

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1019

JOHN V. TERRY and ALINE S. TERRY,
Plaintiff-Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, and LEONARD M. FRIEDMAN, ROBERT K. PUGLIA, and EDWIN J. REGAN, Justices of the Court of Appeal of the State of California, Third Appellate Judicial District,
Defendants-Appellees.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Plaintiff and Cross-Defendant-Appellees.

vs.

JOHN V. TERRY, et ux., et al.,
Defendants and Cross-Complainants-Appellants.

[Filed November 23, 1977]

ORDER

Before: TRASK, WALLACE and ANDERSON, Circuit Judges.

The panel has fully considered the petition for rehearing and it is DENIED.

Appendix C

In the United States District Court for the
Eastern District of California

No. Civ. S-76-320-TJM

JOHN V. TERRY, et al.,
Plaintiffs,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, et al.,
Defendants.

[Filed September 29, 1976]

ORDER DISMISSING COMPLAINT

The motions to dismiss of defendant Klamath Production Credit Association and defendant Justices Leonard M. Friedman, Robert K. Puglia and Edwin J. Regan came on regularly for hearing on September 20, 1976, the Honorable Thomas J. MacBride, Judge, presiding. The court having considered the briefs on the issues, heard oral argument of the parties, and being fully advised, and good cause appearing therefore,

It Is Ordered that the motions to dismiss of defendant Klamath Production Credit Association and defendant Justices Leonard M. Friedman, Robert K. Puglia and Edwin J. Regan are hereby granted;

It Is Further Ordered that the complaint on file herein be and the same is hereby dismissed.

Dated: September 29, 1976.

T. J. MacBride

Judge of the United States
District Court

Copies Mailed to Parties of Record

In the United States District Court for the Eastern District of California

---

No. Civ. S-76-320-TJM

JOHN V. TERRY, et al.,
Plaintiffs,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, et al.,
Defendants.

[Filed November 23, 1976]

ORDER DENYING MOTION FOR RECONSIDERATION

The motion of plaintiffs John V. Terry and Aline S. Terry for reconsideration of the court's order, dated September 29, 1976, dismissing the complaint herein, came on for hearing on November 15, 1976. The court having considered the briefs of the parties, and good cause appearing therefor,

It Is Ordered that the motion for reconsideration is denied.

Dated: November 23, 1976.

T. J. MacBride

Judge of the United States
District Court

Appendix D

In the United States District Court for the Eastern District of California

No. 76-392-PCW

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Plaintiff and Cross-Defendant,
vs.
JOHN V. TERRY, et ux, et al.,
Defendants and Cross-Complainants.

[Filed November 23, 1976]

ORDER DIRECTING REMAND, FORFEITURE OF BOND, AND PAYMENT OF COSTS AND ATTORNEYS' FEES

Defendant Klamath Production Credit Association's motion to remand came on for hearing on November 15, 1976, the Honorable Thomas J. MacBride, Judge, presiding. The court having considered the briefs of the parties, and it appearing that the within action was removed improvidently and without jurisdiction,

It Is Ordered that the motion to remand is granted, and this action is hereby remanded to the Superior Court of the State of California, County of Siskiyou; the clerk of this court is directed to mail a certified

copy of this order to the clerk of said Superior Court;

It Is Further Ordered that defendants' bond for removal is hereby forfeited;

It Is Further Ordered that the clerk of this court shall disburse the proceeds of said bond to Klamath Production Credit Association in care of their attorneys, Diepenbrock, Wulff, Plant & Hannegan, on account of costs as taxed by the clerk, and the remainder on account of attorneys' fees incurred in these proceedings.

Dated: November 23, 1976.

T. J. MacBride

Judge, United States District Court

Supreme Court, U. S.
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	5
A. The petition for writ of certiorari raises no question regarding the dismissal of Klamath Production Credit Association	5
B. The California Court of Appeal acted properly and within its jurisdiction under state law and the defendant judges are thus immune from suit	6
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)	7

Codes

California Code of Civil Procedure:	
Section 43	2, 7
Section 906	3, 7

Constitutions

California Constitution, Art. XI, Sec. 4½, as amended	2

Statutes

28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	2, 5, 6, 7, 8

In the Supreme Court
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit is attached to the Petition for Writ of Certiorari as Appendix A. The District Court wrote no opinion. The unpublished opinion of the California Court of Appeal, Third Appellate District, is attached hereto as Appendix 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1977. Following that court's denial of a Petition for Rehearing, the Petition for Writ of Certiorari was filed December 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Whether, under the circumstances of this case, the justices of the California Court of Appeal are immune from suit under the Civil Rights Act.

STATUTES INVOLVED

The relevant provisions of the Civil Rights Act (42 U.S.C. §1983) and the California Constitution (Art. XI, Section 4½, as amended) are set forth in the Petition for Writ of Certiorari at page 3).

The California Code of Civil Procedure provides, in part:

> "§43. [Powers of appellate court: Determination of law questions: Remittal of judgment.] The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. In giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.
>
> "§906. [Matters reviewable on appeals: Matters reviewable on request of respondent.] Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."

STATEMENT

An action was commenced by Klamath Production Credit Association (KPCA) in the California state

court to collect money due under notes made by John V. Terry and Aline S. Terry, and to foreclose upon the security for the notes. Terrys defended and cross-complained on the ground that KPCA had been guilty of fraud, deceit, undue influence and duress. The cause was tried before a jury, and a verdict in favor of Terrys was returned. Judgment was entered, and KPCA appealed to the Court of Appeal of the State of California, Third Appellate District. Three justices of the Court of Appeal considered the cause and reversed the judgment of the trial court. Basically, the Court of Appeal held that the trial court committed prejudicial error in instructing the jury and in using a verdict form which was confusing. The court pointed out that the erroneous verdict form and the erroneous instructions reflected a fundamental misconception which pervaded the entire trial; that is, the failure to separate the defense claims upon which the Terrys based their claim to cancellation of the notes and the claim of deceit upon which they based their damage action. Additionally, the court found that the trial court erred in purporting to cancel Terrys' outstanding indebtedness on the promissory notes. Finally, the reviewing court found that there was no substantial evidence, contradicted or uncontradicted, to support the jury's verdict. The cause was remanded to the trial court for a new trial.

Following the remittitur of this action to the trial court, Terrys filed this action in the United States District Court, Eastern District of California, against KPCA and the three justices who heard the appeal.

The complaint basically alleged that KPCA prosecuted an appeal "totally lacking in merit", that the defendant judges erroneously reversed the trial court's decision, and that the defendant judges "unlawfully" deprived Terrys of their property without due process of law—all to the benefit of KPCA. Terrys then removed the pending state court action to the District Court, and the two actions were consolidated in that court. KPCA moved to remand the state court action on the ground that the District Court lacked jurisdiction over the action and on the ground that the petition for removal was not timely. KPCA and the defendant judges moved to dismiss the original federal proceeding. The District Court granted the motion to remand and granted the motions to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.

ARGUMENT

A. THE PETITION FOR WRIT OF CERTIORARI RAISES NO QUESTION REGARDING THE DISMISSAL OF KLAMATH PRODUCTION CREDIT ASSOCIATION.

KPCA moved to dismiss Terrys' civil rights action on the ground that KPCA was not charged with acting, and had not acted, under color of state law within the meaning of 42 U.S.C. §1983. The District Court granted the motion and the Court of Appeals affirmed the decision finding that the complaint was insufficient on its face and also finding that "merely utilizing the legal machinery of the state court system is not action

'under color of state law' ". (Petition for Writ of Mandate, Appendix A, p. iv.)

In their statement of questions presented to this Court, petitioners do not articulate any claim that the decisions of the District Court or the Court of Appeals were erroneous in this respect.[1] (Petition for Writ of Mandate, p. 2) Thus, the petition does not question the validity of the federal courts' actions insofar as they directly affect respondent KPCA.

B. THE CALIFORNIA COURT OF APPEAL ACTED PROPERLY AND WITHIN ITS JURISDICTION UNDER STATE LAW AND THE DEFENDANT JUDGES ARE THUS IMMUNE FROM SUIT.

The Petition for Writ of Certiorari raises the question whether justices of the California Court of Appeal are immune from suit under the Civil Rights Act (42 U.S.C. §1983) for acts done outside their jurisdiction. The question is an abstract one, however, because the judicial officers here were clearly acting within their jurisdiction.

Petitioner does not question that the appeal to the California Court of Appeal was properly before that court. Petitioners contend only that the court's consideration of certain instructions and the verdict form was improper, since these items were not specifically

[1]Although the Petition for Writ of Certiorari states "That the wrongful taking was under color of state law by the judges and Federal agency cannot be disputed", no authority whatever is offered for the statement. In fact, KPCA has disputed that it acted under color of state law from the beginning of the action.

assigned as error on appeal.[2] Since the court may decide a case on any proper points or theories, and since the instructions and verdict form were part of the record on appeal, the matters were within the purview of the court's jurisdiction. California law grants the Court of Appeal the power to review a verdict or decision in any intermediate ruling, order or decision which affects the judgment appealed from, and the court has the power to affirm, reverse or modify any judgment or order appealed from. C.C.P. §§43, 906. It thus appears that the defendant judges were acting within their judicial capacity, and that they exercised their jurisdiction within the limits of California law. The Court of Appeals also found that "[t]here is no question that the three judges in reversing the Terrys' lower Court judgment were acting within their judicial jurisdiction." (Petition for Writ of Certiorari, Appendix A, p. iv.) The judges are consequently immune from suit under 42 U.S.C. §1983. *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

Throughout the proceedings below, petitioner has chosen to ignore that in addition to the errors found in the instructions, the California Court of Appeal also found that there was no substantial evidence to support the trial court's judgment. Thus, notwithstanding any other error which the Court of Appeal

[2]Petitioners' bold statements that the judges "falsified the record" (Petition, p. 6) and are guilty, not of error, but of "judicial wrongdoing" (Petition, p. 8), are unsupported by any reference to the record and have no foundation, either in the record or in fact.

may have found, it was bound to reverse the judgment because petitioner had failed to sustain its burden of proof.

CONCLUSION

The question set up by the Petition for Writ of Certiorari does not exist in this case. The justices of the California Court of Appeal for the Third Appellate District clearly acted in their judicial capacity and within the jurisdiction conferred by the laws of the State of California. They are thus immune from suit under 42 U.S.C. Section 1983.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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January 11, 1978

(Appendix 1 Follows)

APPENDIX

Appendix 1

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District

(Siskiyou)

3 Civ. 15090
(Superior Ct. No. 24951)

Klamath Production Credit Association, a corporation,
Plaintiff, Cross-Defendant and Appellant,
vs.
John V. Terry and Aline S. Terry, his wife, et al.,
Defendants, Cross-Complainants and Respondents.

[Filed Mar. 30, 1976]

OPINION

Plaintiff Klamath Production Credit Association (KPCA) is a farm credit bank with its office in Klamath Falls, Oregon. Defendants and cross-complainants John and Aline Terry were engaged in cattle raising and growing potatoes and grain in Siskiyou County. Plaintiff brought this action for the purpose of foreclosing chattel mortgages and trust

deeds given to secure promissory notes, alleging that defendants had failed to pay principal and interest of approximately $45,000, a debt resulting from operating loans to defendants totaling about $68,000. In their answer the Terrys alleged fraud, duress and breach of a confidential relationship as affirmative defenses. In their Fourth Amended Cross-Complaint they sought general and punitive damages and cancelation of the loan instruments on grounds of deceit and breach of a fiduciary relationship.

The issues raised by the cross-action were submitted to a jury, which returned a verdict finding plaintiff guilty of "deceit and undue influence" and awarding defendants $60,000 general damages and $5,000 punitive damages. The court denied plaintiff's motion for judgment notwithstanding the verdict and for new trial and entered a judgment in favor of defendants and against plaintiff for $65,000. The court then entered an additional judgment relieving defendants of any obligation to make "restitution" of sums advanced but refusing to nullify the security instruments. Plaintiff appeals. Defendants cross appeal, charging the court with error in refusing to nullify the security instruments.

In 1967 Terry was raising potatoes, grain and cattle on a ranch of about 239 acres. The California Department of Veterans Affairs held a first deed of trust on the ranch. He had been financing his agricultural operations with various banks. He had a large loan carryover and was told that he could refinance his operations only on the basis of an increased loan limit

and by selling part of his cattle herd. Terry was reluctant to sell his cattle and sought another financing source. In March 1967 he applied to KPCA for a loan which would include more than $31,000 needed to refinance his existing bank loan. KPCA rejected his loan application, suggesting, however, that once his livestock had been sold, the loan committee would be willing to consider financing his operating expenses. Terry reapplied to KPCA, offering to submit his land to a second deed of trust and stating that he wanted to run his cattle through the 1967 season. Because of the offer of additional security, KPCA approved the loan proposal. The approval was expressed in a letter dated March 31, 1967, which informed him that the loan would be subject to a first lien on his equipment and livestock, a second deed of trust on his land and an agreement whereby all cattle were to be sold by December 5, 1967, the maturity date of the loan.

The loan papers were not actually executed until May 1967 because the Veterans Affairs Department had to consent to imposition of a second trust deed on the land. At the time of executing the loan papers, Terry also signed the letter agreement to sell his cattle by the maturity date of the KPCA loan.

In 1967 Terry lost a substantial portion of his potato crop, while his grain crop was average. In November 1967, after the harvest, KPCA told Terry that he would have to sell his cattle, and that one of their members, Yrigoyen, was willing to buy the cattle. Terry was unwilling to sell his cattle but did so at

KPCA's insistence. According to Terry's testimony, a KPCA official told him that the way cattle prices were going down, he could probably replace the cattle for about the same price he was receiving.

The 1967 loan was not paid off and KPCA refinanced Terry in 1968. Although Terry requested funds to buy a new herd of cattle, KPCA would not lend him money for that purpose. Terry was unable to repay the 1967 loan out of the proceeds of the 1968 harvest and KPCA again financed him in 1969. Much of his 1969 potato crop was held in a storage cellar. In April 1970 Terry sought additional funds from KPCA to place his potatoes in cold storage. The request was rejected because, in KPCA's opinion, the potatoes had already started to sprout. Terry was unable to sell his potatoes in 1970; they deteriorated and were finally dumped.

The 1969 loan remained unpaid. During 1970 KPCA advanced Terry some living expenses. In September 1971 KPCA instituted the present lawsuit.

The trial court committed prejudicial error in submitting to the jury instructions and a verdict form which permitted the jury to award damages, general and punitive, for either or both of two seemingly different torts, fraud and deceit.[1] Fraud and deceit

[1]As submitted to the jury, the verdict form read as follows: "WE THE JURY, find for the Terrys on their cross-complaint on the grounds of _____ (here insert any or all of the following terms: Fraud, deceit, duress or undue influence) and award damages in the sum of $_____ to be paid to Terrys by Klamath Production Credit Association and punitive damages in the sum of $_____ to be paid by Klamath Production Credit Association to Terrys."

are separately defined in the Civil Code only because the former is used as one of the grounds for voiding (i.e., by cancellation or rescission) an apparent consent to contract (Civ. Code, §§ 1567, 1571-1573), and the latter is used to define the actionable tort (Civ. Code, §§ 1709-1710). As descriptions of an actionable tort, the words "fraud" and "deceit" are tautological. In a strict sense, acts of fraud give rise to the actionable wrong called "deceit." (See 4 Witkin, Summary of California Law, pp. 2710-2711.)

The instructions and the verdict form submitted to the jury the question whether a tort (deceit) had been committed, but utilized two separate definitions and two separate words as though they described two separate torts, either of which could be separately considered by the jury and either of which could be selected as the basis of a damage award. The instructions and verdict form had a natural tendency to create a jury belief that KPCA might be guilty of something other than fraud, i.e., deceit.

The error was demonstrated and accentuated by the jury's disposition of the alternatives presented to it. The jury entered the words "deceit and undue influence" in the blank space provided. By implication the jury rejected the alternative called "fraud" and accepted the alternative called "deceit." The verdict, as returned by the jury, was self-contradictory.

Moreover, the court erred by submitting to the jury the issue of undue influence, as though this were an actionable tort for which damages could be awarded. Undue influence is a ground for voiding a contract.

(Civ. Code, §§ 1567, 1575.) It is not an actionable tort for which damages may be awarded. (Campbell v. Birch, 19 Cal.2d 778, 791; Bancroft v. Bancroft, 110 Cal. 374, 378.)

Appeals do occur where errors in jury instruction dwindle into relative harmlessness in the light of the entire array of instructions. Here the array of instructions accentuated the error. The erroneous verdict form and the erroneous instructions reflect a fundamental misconception which pervaded the entire trial—the failure to separate the defense claims upon which the Terrys based their claim to cancelation and the claim of deceit upon which they based their damage action.

It is true that the two remedies overlapped to some extent for—to the extent that both were predicated on fraud—they depended upon the same proof. The Terrys' cross-action for the tort of deceit was based upon an affirmance of the contract; their cross-action for cancelation on a disaffirmance. (Brockway v. Heilman, 250 Cal.App.2d 807, 811.) The two remedies were inconsistent, and at some point prior to judgment the Terrys would have to elect between these inconsistent remedies. (Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 678-679; Paularena v. Superior Court, 231 Cal.App.2d 906, 914-915.) Under proper instructions, the jury could find for or against the Terrys on the deceit issue and that finding would be determinative of the issue for the purpose of fraud as a ground of cancelation. (See Paularena v. Superior Court, supra, 231 Cal.App.2d at pp. 914-916; Bank of

America v. Lamb Finance Co., 145 Cal.App.2d 702, 706-707.)

That circumstance, however, did not permit the court to submit both deceit and fraud to the jury as separate actionable wrongs, either of which could serve as the basis for a damage award. Deceit, as defined in Civil Code sections 1709-1710, was the proper issue to submit to the jury as the basis for an award of damages. Fraud, duress or undue influence (as enumerated in Civil Code section 1567 and defined in the following sections) were not. The latter were pleaded defensively only, that is, as grounds of cancelation, and not as the basis for a damage award. The instructions and verdict form were prejudicial, for they permitted the jury to award damages on grounds not substantively cognizable as substantive torts.

KPCA charges the trial court with error in purporting to cancel defendants' outstanding indebtedness on their promissory notes. We fully agree. Defendant's cross-complaint sought cancelation of the notes and security instruments. To cancel a contract means to abrogate so much of it as remains unperformed; it differs from rescission, which seeks to restore the parties to their original positions. (Civ. Code, § 1688; Young v. Flickinger, 75 Cal.App. 171, 174.) Ordinarily, restoration or an offer to restore consideration is a prerequisite to cancelation. (Fleming v. Kagan, 189 Cal.App.2d 791, 796.) Obviously the Terrys were in no position to tender restoration of the money they owed KPCA. The general rule demanding restoration of

consideration is subject to exception where the injured party's inability to repay was the natural result of the other party's wrong or where he claims damages in excess of what he owes. (Boyd v. Lancaster, 56 Cal.App.2d 103, 110; Peterson v. Wagner, 52 Cal.App. 1, 12; see also, Rosemead Co. v. Shipley Co., 207 Cal. 414, 420-421.) Thus the Terrys could get into court and could maintain their cross-complaint for cancelation, without first offering to restore consideration, providing that they ultimately did so. When the case arrived at the point where the court could adjust the respective equities, i.e., by setting off the principal and interest against the damage award, the court failed to do so.

Defendants contend that KPCA "used" the loan money to "destroy" defendants' farming operations. At this point defendants stoutly ignore the fact that they themselves spent the borrowed money. Having been awarded tort damages based upon the contract's affirmance, defendants were not entitled to damages consequential to a disaffirmance. (Brockway v. Heilman, supra.) The court's cancelation of the debt did not fulfill its obligation to eliminate inconsistent items of recovery. (See Civ. Code, § 1692.) By relieving Terry of the duty of "restitution" to KPCA, the court in effect increased the jury's damage award.

Additionally, the court was inconsistent in canceling defendants' unpaid debt to KPCA but refusing to set aside the security interests. The latter stood or fell with the debt.

A major contention raised by KPCA is insufficiency of the evidence to support the jury's finding of deceit. The reviewing court's power begins and ends with the determination that there is substantial evidence, contradicted or uncontradicted, to support the verdict; the appellant (KPCA) must demonstrate that there is no substantial evidence supporting the verdict. (Stevens v. Parke-Davis & Co., 9 Cal.3d 51, 64.)

The elements of fraud which give rise to the tort action of deceit are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage. (4 Witkin, Summary of California Law, p. 2711.) The cross-complaint alleges that kind of fraud which consists of a promise without any intention to perform. (See Civ. Code, § 1710, subd. 4.)

Any rational view of the controversy commences with recognition that KPCA was in the agricultural financing business; that it was entitled to attach conditions to loans or proposed loans; that a would-be borrower could accept or reject such conditions; that, in the absence of contract, KPCA was under no obligation to lend new money or to refinance Terry or any other customer.

Each time Terry borrowed money from the bank he was made fully aware of all conditions and demands attached to the loan. Terry points to no evidence that he was induced to borrow money in reliance on false representations or concealed conditions. His cross-complaint alleges that KPCA represented that it

would continue to provide him with operating capital until his farm produced enough profit to repay the loans. His appeal brief no longer pursues that claim. According to his brief, the gravaman of his damage claim is: (a) that KPCA induced him to sell his cattle by promising to finance acquisition of a new herd; (b) that KPCA had no intent to fulfill that promise; (c) that KPCA refused to finance his acquisition of a new herd; (d) that KPCA forced him to sell his 1967 and 1969 potato crops at a loss. At this point we scrutinize the record for the fraud which produced this damage.

Where a promise to do something is made without any intention to perform it, there is an implied misrepresentation of fact; it is a difficult matter to prove the original lack of intention to perform; nevertheless, circumstantial evidence of subsequent conduct is admissible and may be sufficient. (4 Witkin, Summary of California Law, pp. 2717-2719.)

As is our obligation, we have focused on the evidence designed to support the jury's implied finding that KPCA made promises without the intention to perform. The Terrys point out that their loan application to KPCA was motivated by the unwillingness of past financing sources to provide loans to carry their cattle operation. That circumstance is of no relevance, for KPCA too rejected Terry's initial cattle financing proposal. When his second application was accepted, the loan was accompanied by an express letter agreement that all cattle were to be sold by December 5, 1967, the maturity date of the loan. Terry

claims no ignorance of this condition. Terry points to no evidence of a commitment by KPCA officials that they would refrain from enforcing the cattle sale agreement. His testimony describes no more than a hope or expectation that if he had a profitable harvest, he might be able to avoid sale of his cattle.

Only with the events of November 1967 do we arrive at the events forming the main thrust of the fraud claim. By that time, according to Terry's testimony, he had lost about half of one stand of seed potatoes, "so naturally, my crops was [*sic*] reduced quite a bit." At that time Terry entered into conversations with Don Krider, an official of KPCA. It is Kriden whom Terry accuses of promises devoid of intent to fulfill. According to Terry's testimony, he told Krider whom Terry accuses of promises devoid of innormal sale time for his potato crops, that is, January 15 or thereafter. Krider refused and insisted that Terry sell his cattle by the agreed date and said he had a buyer, one Yrigoyen. A vital excerpt of Terry's testimony is appended in the margin.[3] Accordingly,

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[3]"A. He told me that the way the cattle price looked that they were going to go down and that I'd probably save the feed and would probably get the cattle for about the same price I sold these for possibly, if not cheaper, and that way we would replace the herd in 1968.

"Q. What did you tell him in response to that?

"A. I told him I'd rather keep my own cattle because I knew what they were.

"Q. What did he say specifically, as close as you can, with respect to replacing your cattle in 1968?

"A. Well, that's just about the substance of it right there. He told me that they would replace them in 1968."

At another point of the transcript, Terry repeated his testimony that Krider said the bank would replace the cattle in 1968. The repetition, however, was stricken from the record.

Terry sold his cattle to Yrigoyen. The price to all appearances was a fair one.

The jurors were the sole judges of credibility. As is required on appeal, we disregard conflicting evidence and accept at face value Terry's testimony that Krider told him KPCA would replace (i.e., finance) a new cattle herd in 1968. The jury could reasonably infer that Krider's statement, as described by Terry, amounted to a promise. When, in 1968, Krider declined to lend him money for that purpose, the jury could infer that Krider had made his 1967 promise without any intention of performing it. (Santoro v. Carbone, 22 Cal.App.3d 721, 728.) Krider, moreover, had testified that KPCA had no intention of financing Terry's cattle operations.

Recovery for deceit requires proof of reliance upon the alleged misrepresentation. (Civ. Code, § 1709; Slakey Bros. Sacramento Inc. v. Parker, 265 Cal.App.2d 207-208.) A promise made with no intention of performance is actionable fraud where the other party relies upon it as an inducement to enter into a transaction. (Brockway v. Heilman, supra, 250 Cal.App.2d at p. 811.) Having established a misrepresentation, it became incumbent upon cross-complainants to establish the element of reliance. At this point their proof fails altogether.

In selling his cattle in November 1967, Terry was doing nothing more than he had promised to do when he accepted the bank loan and agreed to sell his cattle by December 5, 1967. The lender had a contractual right to insist that he perform that commitment.

Terry had no right to refuse. Indeed, his refusal would have placed him in breach of contract and would have exposed him to foreclosure of the security instruments he had given KPCA. According to all the evidence, he sold his cattle at his creditor's insistence and not because he was persuaded, i.e., induced, to do so by the creditor's promise to lend him more money for a new cattle herd in 1968.

Closely related to the element of reliance is the factor of materiality, that is, the misrepresentation must be the inducing cause of the action. (See Vai v. Bank of America, 56 Cal.2d 329, 352.) In the analogous area of fraud as a ground of rescission, the courts have rejected findings of fraud where the misrepresentation was not the inducing cause of the contract. " 'The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that a court can say "without it the contract would not have been made." ' " (Greenawalt v. Rogers, 151 Cal. 630, 635.) Terry was bound to sell the cattle by force of his loan agreement regardless of Krider's described promise to lend new money for a replacement herd in 1968. Under these circumstances, the verdict cannot stand. (Greenawalt v. Rogers, supra, 151 Cal. at p. 637.)

The Terry brief charges KPCA with "double-dealing" in having Terry sell his cattle to Yrigoyen, another KPCA borrower. Apparently the statement is made to create an inference that KPCA was motivated by a desire to provide profit to Yrigoyen and impose loss on Terry. Such innuendo is no substitute

for references to concrete evidence of actionable fraud. There is no evidence that KPCA insisted that Yrigoyen be given an exclusive right to buy Terry's cattle, no evidence that Terry could not have sold his cattle elsewhere if he chose. Indeed, Terry admitted that Yrigoyen paid him about what he might have received at auction.

Terry charges KPCA with "gross bad faith" in the spring of 1968 by demanding that Terry sell 18,000 sacks of potatoes at a loss of $2 per sack. Also, in some unspecified fashion, KPCA is charged with Terry's loss of $55,000 on his 1969 potato crop. The Terry brief declares: "Thus the Terrys were being liquidated while they thought they were operating." These claims point to no fraud whatever. They represent accusations made without any reference to specific misrepresentations or reliance upon misrepresentations.

The jury's verdict was based upon the alternative ground of undue influence. There is no evidentiary support for the finding of undue influence. In order to constitute duress or undue influence a threat must be unlawful or false. (Leeper v. Beltrami, 53 Cal.2d 195, 204; Miller v. Walden, 53 Cal.App.2d 353, 361.) A threat to exercise a legal right is not duress or undue influence. (Leeper v. Beltrami, supra; Konecko v. Konecko, 164 Cal.App.2d 249, 252.) The trial record shows no evidence whatever of duress or undue influence in the legal sense of these terms.

Both judgments, of course, must be reversed. It is questionable whether the Terrys can muster evidence

establishing the elements of fraud, duress or undue influence as sufficient grounds for avoiding their unpaid debt; or that they can establish the substantive tort of deceit. We have reviewed their fourth amended cross-complaint. It suffices to avoid a general demurrer only because of an allegation that KPCA represented to the Terrys that it would provide operating capital until their agricultural operations produced sufficient income to repay all sums loaned. What motive KPCA might have for making such representations or promises is a mystery which Terry does not explain. Thus far, there is no substantial evidence in support of that allegation. However, we find no basis for denying the Terrys an opportunity for a new trial in the unlikely event that they may be able to prove that allegation.

Judgments reversed. Costs on appeal will be borne by defendants and cross-complainants Terry.

Friedman J.

We concur:

Puglia P.J.

Regan J.